

RECEIVED
FEDERAL ELECTION
COMMISSION

1
2009 JUN 19 PM 4: 28

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

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4 CELA

5 FIRST GENERAL COUNSEL'S REPORT

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7
8 MUR 6147

9 DATE COMPLAINT FILED: 12/12/08

10 DATE OF NOTIFICATION: 12/17/08

11 LAST RESPONSE RECEIVED: 2/5/09

12 DATE ACTIVATED: 3/18/09

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1 complaint alleges that because the tribute was shown two days before the 2008
2 Presidential general election in which McCain was a candidate, the presentation was
3 essentially free publicity for McCain's Presidential campaign and constituted an
4 unreported in-kind contribution from the Chiefs.

5 As discussed below, based on the factual circumstances and consistent with the
6 Commission's recent decision to dismiss MUR 6020 (Alliance for Climate Protection),
7 we recommend that the Commission exercise its prosecutorial discretion to dismiss this
8 matter.

9 **II. FACTUAL AND LEGAL ANALYSIS**

10 **A. Factual Background**

11 Kansas City Chiefs Football, Inc. ("the Chiefs") is originally a Texas corporation
12 that moved its operations to Kansas City, Missouri in 1963. It operates a professional
13 football club within the National Football League ("NFL"). The Chiefs' football games
14 are played at Arrowhead Stadium, which is part of the publicly financed and controlled
15 Harry S. Truman Sports Complex owned by the Jackson County Sports Complex
16 Authority, an agent and political subdivision of Jackson County, Missouri. See
17 www.jcaca.org/generalinformation.aspx (last visited May 6, 2009).

18 As part of the NFL's annual November Veterans' Recognition celebrations, the
19 Chiefs held its Military Appreciation Day on November 2, 2008 during its only home
20 game in November before the official November 11, 2008 Veterans' Day holiday. See
21 the Chiefs and McCain Committee Responses at 1. The Chiefs' Military Appreciation
22 Day was advertised to the public as an opportunity for current and former members of the

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1 United States military and their families to attend an NFL game at reduced prices, and be
2 honored throughout the game with military tributes, a "flyover" by military planes, and
3 other military-themed special entertainment. *See* McCain Committee Response at 1. The
4 military appreciation activities were scheduled throughout the game and included: a
5 recognition of past, present, and future U.S. Army soldiers; special honors to three
6 notable veterans; a performance by a local color guard; the national anthem by an Army
7 sergeant; performance of a military-themed routine by the Chiefs' cheerleaders; a half-
8 time show featuring a giant United States Flag held by 100 army troops, a tribute to
9 wounded soldiers, and an Army induction ceremony. *See id.*

10 As it has done in previous years, the Chiefs recruited high-profile individuals to
11 pay tribute to current and veteran members of the United States military during the
12 celebration as a public service. *See* Affidavit of Howie Erenberg, the Chiefs' Manager of
13 Game and Event Presentation, attached to McCain Committee Response. Gene Simmons
14 (of the musical group KISS) and Senator John McCain were selected to present
15 videotaped tributes to be shown on Arrowhead Stadium's two JumboTron screens during
16 the pre-game activities.¹ *See id.*; the Chiefs Response at 1. Senator McCain, a prominent
17 Vietnam War veteran, senior Senator on the Senate Armed Services Committee, and a
18 strong advocate for military veterans, had previously given tributes to United States
19 military personnel prior to his 2008 Presidential bid.

20 McCain's 30-second videotaped tribute, which focused on veterans' service to the
21 country and contained no electoral references, read as follows:

¹ There were also videotaped messages throughout the game on the JumboTron screens from Chiefs fans serving overseas.

1 Today at Arrowhead, we are honoring the fine men and
2 women in uniform who have served and continue to serve
3 this country. The sacrifice that these men and women
4 make, allow us to enjoy unparalleled personal freedom and
5 quality of life in the United States of America. We should
6 honor those who are currently in harm's way defending our
7 freedom, and the brave families that await their safe return.
8 And to all those who have returned from overseas -
9 welcome home.

10
11 To all men and women serving in our armed forces, to their
12 families, and to our veterans: you are the best Americans, you are
13 the bravest among us. What you have done for us, we can never
14 do for you. But we are mindful of that distinction, and humbled by
15 it. And our appreciation for your service demands us all to do
16 what we can, in less trying and less costly circumstances, to help
17 keep this nation a place and an idea worthy of the hardships,
18 danger and sacrifices you have born so valiantly for us.

19
20 Thank you.

21
22 The Chiefs asserts that McCain's tribute and the other military celebration
23 activities were prepared and intended only for the game attendees inside Arrowhead
24 Stadium. See Affidavit of Howie Erenberg. Available information shows that the
25 football game was televised on FOX TV in both the Kansas City metropolitan area and
26 parts of Florida, and that Direct TV subscribers with a subscription to the NFL football
27 package were able to watch the game. However, it is unclear whether the pre-game
28 tribute itself was televised.

29 The Chiefs invited Senator McCain and other celebrities to participate in its
30 Veterans' Day celebrations, and accordingly, the Chiefs did not charge Senator McCain
31 or any other participant a fee in connection with showing the videotaped tribute. See the
32 Chiefs Response at 1. The Chiefs claim that they incurred no additional or incremental
33 costs in showing McCain's 30-second tribute because the JumboTron screens would have

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1 remained on during the celebration regardless. However, the Chiefs did not address
2 whether they incurred any cost in creating or producing the tribute. See Affidavit of
3 Howie Erenberg; the Chiefs Response at 3.

4 **B. Discussion**

5
6 The Federal Election Campaign Act of 1971, as amended ("the Act"), establishes
7 limitations, prohibitions, and reporting requirements for contributions and expenditures
8 made for the purpose of influencing federal elections. Contributions can be monetary or
9 "in-kind." In-kind contributions include an expenditure made by any person "in
10 cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate,
11 his authorized political committees, or their agents," and are subject to the same
12 restrictions and reporting requirements as other contributions.² 2 U.S.C. § 441a(a)(7)(A),
13 (B)(i); 11 C.F.R. §§ 100.52(d)(1), 109.21(b). The Commission's regulations at 11 C.F.R.
14 § 109.21 provide that coordinated communications constitute in-kind contributions from
15 the party paying for such communications to the candidate, candidate's authorized
16 committee, or political party committee which coordinates the communication.³

17 The criteria for a coordinated communication consist of three prongs – payment
18 by someone other than the candidate or the candidate's authorized committee (or the

² It does appear that McCain's tribute qualifies as an independent expenditure, since it did not contain express advocacy under 11 C.F.R. § 100.22(a) or (b). See 2 U.S.C. § 431(17); 11 C.F.R. § 100.16.

³ In *Shays v. F.E.C.* ("Shays II"), the U.S. District Court for the District of Columbia held that the Commission's revisions of the content and conduct standards of the coordinated communications regulation at 11 C.F.R. § 109.21(e) and (d) violated the Administrative Procedure Act; however, the court did not enjoin the Commission from enforcing the regulations. 508 F. Supp. 2d 10 (D.D.C. Sept. 12, 2007) (granting in part and denying in part the respective parties' motions for summary judgment). The D.C. Circuit affirmed the district court with respect to, *inter alia*, the current standard for public communications made before the time frames specified in the standard, and the rule for when former campaign employees and common vendors may share material information with other persons who finance public communications. See *Shays v. F.E.C.* ("Shays III"), No. 07-5360, 2008 WL 2388661 (D.C. Cir. June 13, 2008).

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1 political party committee, where applicable); satisfaction of one or more content
2 standards (which include public communications that reference a clearly identified
3 candidate within a prescribed period prior to an election); and satisfaction of one or more
4 conduct standards (which include the candidate's material involvement in decisions
5 regarding the communication). All three prongs must be met for a communication to be
6 considered coordinated. 11 C.F.R. § 109.21. Although Respondents concede that the
7 third prong of the test may be viewed as being met by the candidate's participation in the
8 tribute, they dispute whether the payment or the content prongs of the test were satisfied
9 by the JumboTron tribute. While the Commission could conclude that the disputed
10 prongs also were met – because the Chiefs likely incurred some unreimbursed costs in
11 creating or producing the tribute and because the message that referenced a clearly
12 identified Presidential candidate within 120 days before an election was displayed on an
13 outdoor advertising facility- the Commission need not reach this analysis.

14 In MUR 6020 (Alliance for Climate Protection), the Commission exercised its
15 prosecutorial discretion to dismiss allegations that an environmental group had made a
16 coordinated in-kind contribution by featuring Speaker of the House of Representatives
17 Nancy Pelosi in broadcast and print communications to call attention to the need for
18 public action to prevent further climate change. See Commission Certification dated May
19 6, 2009. Although there was information suggesting the advertisement met the test for a
20 coordinated communication, the Commission concluded that even if the advertisement
21 met the coordinated communication standards, under the overall circumstances, which
22 included a basis for concluding that the advertisement was not intended to influence an
23 election, further enforcement action would not be a prudent use of the Commission's

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1 limited resources. *See* MUR 6020, Statement of Reasons of Chairman Steven T.
2 Walther, Vice Chairman Matthew S. Petersen, and Commissioners Cynthia L. Bauerly,
3 Caroline C. Hunter, and Donald F. McGahn II.

4 The overall combination of circumstances in this matter is similar to those in
5 MUR 6020. The tribute was part of a larger NFL sponsored Veterans' Day program at
6 Arrowhead Stadium that honored American military personnel. The tribute did not
7 mention McCain's personal military service or contain any words that could be viewed as
8 promoting or supporting his candidacy. Further, there is no information showing that
9 McCain, one of the country's most prominent veterans, was selected to present the tribute
10 based on his Presidential bid. As the Commission pointed out in its reasoning in MUR
11 6020, both the Chiefs and McCain should have paid closer attention to the appearance
12 created by the tribute's proximity to the election, but these circumstances do not justify
13 further enforcement action.

14 Accordingly, to be consistent with the result in MUR 6020, we recommend that
15 the Commission dismiss this matter and close the file as a matter of prosecutorial
16 discretion. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

17 **III. RECOMMENDATIONS**

- 18 1. Dismiss this matter as a matter of prosecutorial discretion.
19
20 2. Approve the attached joint Factual and Legal Analysis.
21

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3. Approve the appropriate letters.

4. Close the file.

Thomasenia P. Duncan
General Counsel

Ann Marie Terzaken
Associate General Counsel
for Enforcement

6-18-09
Date

BY: K. L. Guth
Kathleen Guth
Deputy Associate General Counsel

Mark Shonkwiler
Mark Shonkwiler
Assistant General Counsel

Kimau Philbert
Kimau Philbert
Attorney

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